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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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KING COUNTY,

Respondent,

vs.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,  
a Connecticut corporation; LIBERTY MUTUAL INSURANCE  
COMPANY, a Massachusetts corporation; FEDERAL INSURANCE  
COMPANY, an Indiana corporation; FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND, a Maryland corporation; and ZURICH  
AMERICAN INSURANCE COMPANY, a New York corporation,

Petitioners.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the circumstances under which *Olympic Steamship* fees may be abrogated by a statutory award of attorney fees.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This case presents the Court with an opportunity to decide whether a statute that provides a means to obtain an award of attorney fees in a case arising out of a public works contract preempts an award of *Olympic Steamship* attorney fees against a surety that denied coverage under a performance bond. The facts are drawn from the Court of Appeals opinion, *King County v. Vinci Const. Grands Projets*, 191 Wn. App. 142, 364 P.3d 784 (2015), *review granted*, 186 Wn.2d 1008, 380 P.3d 459 (2016), and the briefs of the parties. *See* Appellants Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company, of Maryland, and Zürich American Insurance Company (Sureties) Br. at 8-18; King County Br. at 4-9; Sureties' Pet. for Rev. at 2-4; King County Answer to Pet. for Rev. at 3-13.

King County drafted bid documents, including contracts and surety bonds, for a major expansion of the county's wastewater treatment system. The County submitted contract documents to the bidders, accepted a bid and hired a joint venture consisting of three construction firms (VPFK) on a contract to construct portions of the tunneling work for the project. The contract was for a fixed price and required performance within a specified timeframe. As required by RCW 39.08.010, VPFK obtained a performance and payment bond. The Sureties bound themselves "in the full sum of the Contract Price ... for the faithful performance" of the contract. The Sureties' obligation would be triggered by VPFK's default: "[W]henver Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety, at the request of the Owner, shall promptly remedy the default in a manner acceptable to the Owner."

VPFK encountered multiple difficulties and delays in the tunneling project. When VPFK failed to meet its contract deadlines, the County declared that VPFK was in default and that pursuant to the bond the Sureties had a duty to correct VPFK's defaults. The Sureties denied the County's claim on the basis that VPFK was not in default of its contract obligations. The County retained another contractor to complete one of the tunnels.

King County sued VPFK and the Sureties, alleging that VPFK was in default of the contract and the Sureties breached the bond by failing to remedy VPFK's default. VPFK and the Sureties denied that VPFK breached

the contract, and VPFK submitted multiple counterclaims. At the conclusion of trial, the jury found that VPFK breached the contract and awarded the County the entire amount of its alleged damages. The jury awarded VPFK damages based upon change orders it had submitted to County. The trial court awarded the County attorney fees against the Sureties pursuant to *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007).

VPFK and the Sureties appealed, and the Court of Appeals affirmed. 191 Wn. App. at 148, 193. With respect to the award of attorney fees in favor of the County against the Sureties, the Court of Appeals relied upon one of the equitable principles that may justify an award of attorney fees set forth in *Olympic Steamship*: “[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees.” 191 Wn. App. at 183 (quoting *Olympic Steamship*, 117 Wn.2d at 54). The court also relied upon *Colorado Structures*, stating that the Supreme Court expressly extended the *Olympic Steamship* rule to apply to an action by an obligee to recover on a performance bond so that a surety who wrongfully denies coverage is liable for attorney fees. 191 Wn. App. at 183 (citing *Colorado Structures*, 161 Wn.2d at 597-98).<sup>1</sup>

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<sup>1</sup> In *Colorado Structures*, the four justice lead opinion and a dissenting opinion by one justice held that the obligee on a performance bond was entitled to *Olympic Steamship* fees. See 161 Wn.2d at 597-98 (Chambers, J., plurality); 161 Wn.2d at 638 (Sanders, J., dissenting). In *Matsyuk v. State Farm*, 173 Wn.2d 643, 660 n.5, 272 P.2d 802 (2012), the Court stated that *Colorado Structures* does not have a majority rule on the proposition regarding whether *Olympic Steamship* fees are available in the context of a performance bond. WSAJ Foundation does not address this issue, and confines its argument to the

The Sureties argued the equitable principles from *Olympic Steamship* and *Colorado Structures* are inapplicable because an award of fees in cases arising out of public works contracts is governed exclusively by RCW 39.04.240, which adopts a modified version of the attorney fee provisions from RCW 4.84.250 through 4.84.280. 191 Wn. App. at 184. RCW 4.84.250-.280 set out a statutory scheme that allows an award of attorney fees to a party that recovers an amount greater than the amount that party offered to accept in settlement, and allows an award of attorney fees to the defending party if the adverse party recovers an amount less than the defending party offered to pay in settlement.

The Sureties contended that since King County never made a settlement offer under RCW 39.04.240(1), it was not entitled to an award of attorney fees. 191 Wn. App. at 185. The Court of Appeals stated that nothing in the statute conveyed an intent that RCW 39.04.240 is the exclusive method for recovering attorney fees in a dispute over a performance bond in a case arising out of public works contracts, and declined to hold that the equitable principles in *Olympic Steamship* and *Colorado Structures* allowing an award of attorney fees do not apply in cases arising from public works contracts. *Id.* at 185-86.

The Sureties also argued that *Olympic Steamship* fees should not have been awarded because King County failed to segregate its fees incurred in litigating the coverage dispute from fees incurred in the non-

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proposition that *Olympic Steamship* fees are available to a public entity despite the availability of an award of attorney fees under RCW 39.04.240.

coverage matters. *Id.* at 186. The Court of Appeals held that the attorney fees could not be segregated because the Sureties adopted VPFK's defenses as the basis for denying coverage and thus the Sureties' claims arose out of the same set of facts and were based on related legal theories. *Id.* at 189.

VPFK and the Sureties petitioned for review. VPFK's petition was denied and the Sureties' petition was granted. *King County v. Liberty Mut. Ins. Co. et al.*, 186 Wn.2d 1008, 380 P.3d 459 (2016). The sureties sought review on two issues: 1) whether *Olympic Steamship* fees are recoverable by a public entity that is not entitled to fees under RCW 39.04.240; and 2) whether fees recoverable from the surety in litigating a coverage dispute over a performance bond must be segregated from non-recoverable fees incurred litigating the underlying public works contract dispute. Sureties' Pet. For Rev. at 1-2.

### III. ISSUE PRESENTED

*Are Olympic Steamship* fees recoverable by a public entity against a surety in an action arising from a public works contract where a statute (RCW 39.04.240) provides a means for the recovery of attorney fees in an action arising from a public works contract?

See Sureties' Pet. for Rev. at 1-2; King County's Ans. to Pet. for Rev. at 2-3.

### IV. SUMMARY OF ARGUMENT

Courts have applied the *Olympic Steamship* rule to award attorney fees to an obligee against a surety that wrongfully denied coverage under a performance bond. RCW 39.04.240 provides a means for the parties in a cause of action arising from a public works contract to recover attorney fees.

There is no language in RCW 39.04.240 and no other indication that shows a legislative intent that the remedy provided in that statute is exclusive and preempts an award of *Olympic Steamship* fees. The recovery of attorney fees pursuant to RCW 39.04.240 and the equitable remedy of an award of *Olympic Steamship* fees serve distinct and different purposes. An award of attorney fees pursuant to RCW 39.04.240 does not provide a remedy for the “wrong” addressed by an award of *Olympic Steamship* fees. This Court should hold the remedy provided by the recovery of attorney fees pursuant to RCW 39.04.240 is not exclusive and does not preempt an award of *Olympic Steamship* fees.

## V. ARGUMENT

### A. **The *Olympic Steamship* Fees Rule Has Been Applied To A Surety’s Denial Of Coverage Under A Performance Bond.**

Washington follows the American rule that “attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity.” *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995) (citing Philip A. Talmadge, *The Award of Attorneys’ Fees in Civil Litigation in Washington*, 16 Gonz. L. Rev. 57 (1980)). The “central holding” in *Olympic Steamship* is that “[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees...” *McGreevy*, 128 Wn.2d at 28 (quoting *Olympic Steamship*, 117 Wn.2d at 54). This holding is consistent with the American rule on attorney fees that an award of fees may be based

on recognized grounds of equity. *Gossett v. Farmers Ins. Co. of Washington*, 133 Wn.2d 954, 978, 948 P.2d 1264 (1997); *McGreevy*, 128 Wn.2d at 35.

This Court has observed that a motivation for obtaining an insurance contract is to seek “protection from expenses arising from litigation, not ‘vexatious, time-consuming, expensive litigation with his insurer.’” *Olympic Steamship*, 117 W.2d at 52 (quoting *Hayseeds, Inc. v. State Farm Fire & Casualty Co.*, 352 S.E.2d 73, 77 (W.Va. 1986)). “In light of this verity we have held ‘when an insurer unsuccessfully contests coverage, it has placed its interests above the insured’; and ‘[o]ur decision in *Olympic Steamship* remedies this inequity by requiring that the insured be made whole.’” *Panorama Village Condominium Owners Ass’n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 143-144, 26 P.3d 910 (2001) (quoting *McGreevy*, 128 Wn.2d at 39-40). The Court has also noted that allowing an award of attorney fees encourages the prompt payment of claims. *Olympic Steamship*, 117 Wn.2d at 53.

This Court and the Court of Appeals have applied *Olympic Steamship* to actions arising out of surety bonds. *Estate of Jordan v. Hartford Accident & Indemnity Co.*, 120 Wn.2d 490, 844 P.2d 403 (1993); *Axess Int’l Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 30 P.3d 1 (2001). That is because “all surety bonds are regarded as ‘in the nature’ of insurance contracts and controlled by the rules of interpretation of such contracts.”

*Colorado Structures*, 161 Wn.2d at 598 (quoting *Nat'l Bank of Wash. v. Equity Investors*, 86 Wn.2d 545, 551, 553, 546 P.2d 440 (1976).

In *Colorado Structures*, the Court of Appeals held that an award of *Olympic Steamship* fees applied in favor of a contractor against the surety on a subcontractor's performance bond. *Colorado Structures, Inc. v. Ins. Co. of the West*, 125 Wn. App. 907, 928, 106 P.3d 815 (2005). In the Supreme Court, four justices in the lead opinion and one dissenting justice agreed with the application of *Olympic Steamship* fees. 161 Wn.2d at 597, 638. The defendant surety argued that fees should not be allowed under the equitable rule because one of the reasons supporting the *Olympic Steamship* rule – the unequal bargaining power between an insurance company and its policyholder – is not present in the surety - obligee context. *Id.* at 598-99.

The plurality disagreed:

When an event occurs that arguably triggers the surety or insurance company's duty to make payments, the parties may dispute whether payment is in fact owed. The disparity of power, at this point in the relationship, is compelling. Sureties may be tempted to withhold payment in every case, gambling that the transaction costs of litigation will dissuade even a percentage of their obligees from asserting their right to payment. If the maximum risk to the surety is the penal amount of its bond, a surety has nothing to lose. The obligee has no leverage over the surety to compel payment, except litigation. If the transaction costs of litigation are too high relative to the bond, obligees will simply cut their losses.

... As our court held in *Olympic Steamship*, principles of equity require courts to award attorney fees to the obligee to remedy the disparity inherent in these financial relationships.... The disparity of power between surety and obligee is, with respect to compulsion of performance, identical to the disparity between insurers and the insured.

The disparity of bargaining power is relevant, but more important is the disparity of enforcement power.... While our opinion in *Olympic Steamship* made reference to disparity of bargaining power, it focused far more on preventing an insured from bearing the burden of an insurer's improper refusal to provide coverage.

161 Wn.2d at 602-03 (citations omitted).

The defendant surety also contended that *Olympic Steamship* should not apply because the litigation concerned a claims dispute as opposed to a coverage dispute. 161 Wn.2d at 606. A case that presents a dispute over the value or amount of a claim is not governed by the *Olympic Steamship* rule. *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). The *Olympic Steamship* rule applies in a case where the dispute concerns the existence or extent of coverage. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 147, 930 P.2d 288 (1997). In *Colorado Structures*, the plurality held that the case would be in the nature of a claims dispute if the surety had agreed to pay under the bond but had a factual dispute with the contractor as to the amount of the payment. However, because the surety there refused to pay *any* claim based upon its legal interpretation of the bond, the case involved a coverage dispute subject to *Olympic Steamship*. 161 Wn.2d at 606.

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**B. The Equitable Remedy Of An Award Of *Olympic Steamship* Fees Should Not Be Abrogated By The Presence Of A Statutory Procedure For Recovering Attorney Fees Unless There Is Evidence That The Legislature Intended The Statutory Scheme To Preempt The *Olympic Steamship* Remedy, And No Evidence Of Legislative Intent To Preempt Exists Here.**

The Sureties argue that RCW 39.04.240's method for seeking recovery of attorney fees between the parties in an action arising from a public works contract preempts the equitable award of *Olympic Steamship* fees against a surety that denies coverage on a performance bond issued in conjunction with the public works contract. Sureties' Br. at 23; Sureties' Reply Br. at 8; Supp. Br. at 7-8. The Sureties cite *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990), for the proposition that courts "will not give relief on equitable grounds in contravention of a statutory requirement." This proposition is inapplicable here because there is no evidence that the Legislature intended a "requirement" that the provisions of RCW 39.04.240 preclude application of *Olympic Steamship* fees against a surety that wrongfully denies coverage.

- 1) ***Olympic Steamship* should not be deemed preempted by RCW 39.04.240 because nothing in its language indicates the Legislature intended it to be the exclusive remedy for awarding attorney fees in any action arising out of a public works contract.**

Probably the most important of the equitable maxims is that equity will not suffer a wrong to be without a remedy. *Rummens v. Guaranty Trust Co.*, 199 Wash. 337, 346-47, 92 P.2d 228 (1939). Where there is a substantive legal right "it is the province of equity to afford proper relief, unless the statutory remedy is exclusive." *Id.* at 347. If the statutory remedy

is exclusive, “equity follows law and cannot provide a remedy where legislation expressly denies it.” *Town Concrete Pipe of Washington, Inc. v. Redford*, 43 Wn. App. 493, 498, 717 P.2d 1384 (1986); *see also Williams v. Duke*, 125 Wash. 250, 254, 215 P. 372 (1923).

“Whether a statutory enactment acts to preempt or diminish common law rights is determined by legislative intent, ... and ‘it must not be presumed that the Legislature intended to make any innovation on the common law without clearly manifesting such intent.’” *In re Parentage of L.B.*, 155 Wn.2d 679, 695 n. 11, 122 P.3d 161 (2005) (quoting *Green Mountain Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 161, 351 P.2d 525 (1960)). If the Legislature intends a remedy provided by a statute to be exclusive, it is very simple to expressly say so. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 81, 196 P.3d 691 (2008); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 62, 821 P.2d 18 (1991).

The inclusion of a remedy in a statute does not, by itself, express legislative intent that the remedy is exclusive. In *McGreevy v. Oregon Mut. Ins. Co.*, *supra*, this Court rejected the argument that the equitable remedy of an award of *Olympic Steamship* fees was preempted by the provision for an attorney fee award in the Consumer Protection Act:

We are also convinced that the Legislature has not preempted the field of determining when attorney fees may be awarded in controversies over insurance coverage. Oregon Mutual and the amici that support its position argue that the Legislature has preempted the area because it has specifically provided for attorney fees in cases where a Consumer Protection Act violation is found to have been committed by an insurance company.... Significantly, there

is nothing in the language of the Consumer Protection Act, and we know of no other authority, for the proposition that the Legislature intended to make that Act the exclusive means to recover attorney fees in a case involving a dispute over the coverage of an insurance policy. Consequently, we are satisfied that the Legislature intended the Consumer Protection Act to be only one avenue to obtain fees, and not the exclusive means for an aggrieved party to obtain fees in actions involving insurance coverage.

128 Wn.2d at 38-39.

The language of RCW 39.04.240 does not include an express statement that its method for seeking a recovery of attorney fees is exclusive. Without some other clear evidence that the Legislature intended the statutory remedy to be exclusive, its fee provisions should not preempt an award of *Olympic Steamship* fees.

- 2) ***Olympic Steamship* fees should not be deemed preempted by RCW 39.04.240 fees because these remedies apply in conceptually distinct situations and serve different purposes.**

In the absence of statutory language clearly establishing the exclusivity of a remedy, the Court may look to “other manifestations of legislative intent” to determine whether the Legislature intended a statute to be an exclusive remedy. *Potter*, 165 Wn.2d at 84 (quoting *Wilmot*, 118 Wn.2d at 54). The comprehensiveness or adequacy of the remedy provided in a statute can be a significant factor in considering whether there is a clear indication that the Legislature intended an exclusive remedy. *Potter*, 165 Wn.2d at 84; *Wilmot*, 118 Wn.2d at 61.

The recovery of attorney fees provided for in RCW 39.04.240 does not address the “wrong” corrected by an award of *Olympic Steamship* fees,

*i.e.*, an award of attorney fees to an insured against an insurer who wrongfully denies coverage. RCW 39.04.240(1) states that a modified version of the provisions of RCW 4.84.250 through .280 shall apply to an action arising out of a public works contract.

The “offer of settlement” provisions of RCW 4.84.250 - .280 set forth a procedure to recover attorney fees where the claim for damages is less than \$10,000. If the plaintiff makes an offer to settle the claim and then exceeds the amount of the settlement offer in a verdict at trial, the plaintiff is entitled to an award of attorney fees (RCW 4.84.250, .260); if the defendant makes an offer to settle the claim and then the plaintiff recovers a verdict at trial that is less than the amount of the defendant’s settlement offer, the defendant is entitled to an award of attorney fees (RCW 4.84.250, .270). The purposes of RCW 4.84.250 - .280 are to encourage out-of-court settlements, to penalize parties who unjustifiably bring or resist small claims, and to enable a party to pursue a meritorious small claim without seeing the award diminished by legal fees. *Williams v. Tilaye*, 174 Wn.2d 57, 62, 272 P.3d 235 (2012); *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987).

RCW 39.04.240(1) adopts RCW 4.84.250 - .280 but removes the \$10,000 maximum dollar limitation and sets the period for serving settlement offers to 30 - 120 days after initiating the lawsuit. The probable purposes of RCW 39.04.240 are to encourage early out-of-court settlements in actions arising from public works contracts, to penalize parties who

unjustifiably bring or resist actions arising from public works contracts, and to enable a party to pursue a meritorious action arising from a public works contract without seeing the award diminished by legal fees. The probable intent of this statutory method for the recovery of attorney fees is to encourage early settlement proposals between the public entity and contractor in disputes concerning the public works contract, and to provide a means to award attorney fees to the public entity or the contractor in disputes related to the public works contract. Nothing in the language of the statute, and no other authority, suggests the statutory remedy is intended to foreclose an award of *Olympic Steamship* fees in favor of the public entity against a surety that wrongfully denies coverage under a performance bond.

The “offer of settlement” method for seeking an award of attorney fees in RCW 39.04.240 is inapplicable to a dispute over coverage in a performance bond. A plaintiff’s pretrial offer to settle for a stated settlement amount or a defendant’s pretrial offer to pay a stated settlement amount under the statutory scheme does not affect a claim for attorney fees for wrongful denial of coverage under a performance bond. If King County followed the procedures in RCW 39.04.240 and made a pretrial offer to accept \$100 million, and then proceeded through trial and obtained a \$50 million verdict, King County would not be entitled to an award of attorney fees against VPFK under the statute. However, King County would still be entitled to seek an award of *Olympic Steamship* fees against the Sureties because King County was forced to go through trial and prove VPFK’s

default in order to establish the Sureties' coverage under the performance bond.

If VPFK and the Sureties followed the statutory procedures and made a pretrial offer to pay King County \$100 million in settlement, and then the parties proceeded through trial and King County obtained a \$50 million verdict, King County would not be entitled to an award of attorney fees against VPFK and VPFK would be entitled to an award of attorney fees against King County under the statute. However, the Sureties would not be entitled to an award of attorney fees against King County and King County would still be entitled to seek an award of *Olympic Steamship* fees against the Sureties because King County was forced to go through trial and prove VPFK's default in order to establish the Sureties' coverage under the performance bond. A pretrial offer by VPFK and the Sureties to pay a stated dollar amount in settlement under the statutory scheme does not establish an admission of coverage by the Sureties under the performance bond.

As stated in the dissent in *Colorado Structures*, when a performance bond obligee declares a principal in default, and the surety accepts coverage under the performance bond, the surety has three options: it may remedy the default by, for example, financing the principal; it may complete the contract itself by arranging for another contractor to perform the principal's obligations; or it may simply pay the obligee the costs of completing the contract. 161 Wn.2d at 612 (Madsen, J., concurring in dissent). These options are examples of the surety's "performance" under the obligations of

its performance bond. A surety's offer to settle a case for a stated dollar amount under the procedures set forth in RCW 39.04.240 does not constitute an offer to meet its obligations under the performance bond, and accordingly does not constitute an offer to accept coverage under the performance bond.<sup>2</sup> Absent the surety's agreement to accept coverage under the performance bond, the obligee is forced to incur litigation expenses to establish the principal's default, which, in turn, establishes the surety's coverage under the performance bond. This is no different than "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract," *Olympic Steamship*, 117 Wn.2d at 54, and should entitle the obligee to an award of attorney fees against the surety.

Nothing in RCW 39.04.240 suggests that the legislature intended the method for seeking attorney fees in that statute to be the *exclusive* remedy for recovering attorney fees against a surety that denies coverage under a performance bond, and nothing in that statute precludes the availability of equity to provide an award of attorney fees against a surety that wrongfully denies coverage. The remedy provided for recovering attorney fees through the "offer of settlement" procedures in RCW 39.04.240 is not sufficiently comprehensive or adequate to compensate the obligee "who is compelled

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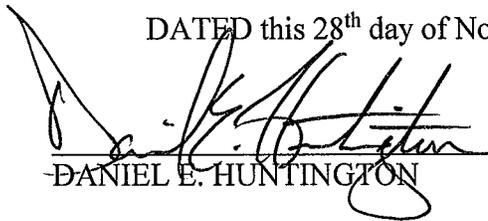
<sup>2</sup> "More than just money is at stake in a coverage case. In *Olympic Steamship*, we recognized the cost of compelling an insurer to honor its commitment includes not only the out-of-pocket expense of pursuing such action, but also the time and 'vexatiousness' such litigation necessarily entails. *Olympic S.S.*, 117 Wn.2d at 52-53; *accord McGreevy*, 128 Wn.2d at 35. Moreover, the *Olympic Steamship* rule is designed to 'encourage the prompt payment of claims.' *Olympic S.S.*, 117 Wn.2d at 53; *McGreevy*, 128 Wn.2d at 37 n.9. Were [the insurer's] position to prevail, it would encourage foot dragging by insurers." *McCrary v. Northern Ins. Co.*, 138 Wn.2d 550, 560, 980 P.2d 736 (1999) (brackets added).

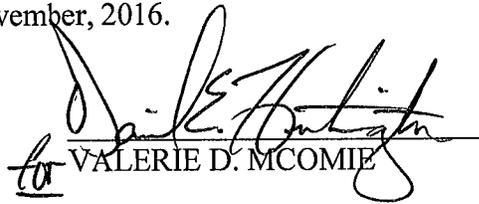
to assume the burden of legal action to obtain the benefit” of coverage under a performance bond. The legal remedy provided by RCW 39.04.240 is distinct from the equitable remedy provided by the *Olympic Steamship* rule.

## VI. CONCLUSION

This Court should affirm the Court of Appeals and hold that the remedy for the recovery of attorney fees provided by RCW 39.04.240 is not exclusive and does not preempt an award of *Olympic Steamship* fees.

DATED this 28<sup>th</sup> day of November, 2016.

  
DANIEL E. HUNTINGTON

  
VALERIE D. MCOMIE

On Behalf of WSAJ Foundation

# APPENDIX

**RCW 39.04.240****Public works contracts—Awarding of attorneys' fees.**

(1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

(2) The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

[ 1999 c 107 § 1; 1992 c 171 § 1.]

**RCW 4.84.250****Attorneys' fees as costs in damage actions of ten thousand dollars or less—Allowed to prevailing party.**

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

[ 1984 c 258 § 88; 1980 c 94 § 1; 1973 c 84 § 1.]

**NOTES:**

**Court Improvement Act of 1984—Effective dates—Severability—Short title—1984 c 258:**  
See notes following RCW 3.30.010.

**Effective date—1980 c 94:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect May 1, 1980." [ 1980 c 94 § 6.]

**RCW 4.84.260****Attorneys' fees as costs in damage actions of ten thousand dollars or less—When plaintiff deemed prevailing party.**

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

[ 1973 c 84 § 2.]

**RCW 4.84.270****Attorneys' fees as costs in damage actions of ten thousand dollars or less—When defendant deemed prevailing party.**

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

[ 1980 c 94 § 2; 1973 c 84 § 3.]

**NOTES:**

**Effective date—1980 c 94:** See note following RCW 4.84.250.

**RCW 4.84.280****Attorneys' fees as costs in damage actions of ten thousand dollars or less—Offers of settlement in determining.**

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.

[ 1983 c 282 § 1; 1980 c 94 § 3; 1973 c 84 § 4.]

**NOTES:**

**Effective date—1980 c 94:** See note following RCW 4.84.250.